

Laidlaw Waste Systems, Inc. and International Brotherhood of Teamsters, Local Union 997, Petitioner. Case 16-RC-9837

July 16, 1996

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS COHEN
AND FOX

The National Labor Relations Board, by a three-member panel, has considered the Petitioner's objection to an election held December 15, 1995, and the hearing officer's report recommending its disposition. The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows 71 votes for, and 123 votes against, the Petitioner, with 6 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the Employer's exceptions and the briefs of both the Employer and the Petitioner, and has adopted the hearing officer's findings and recommendations to the extent consistent with this decision. The Board finds, in agreement with the hearing officer, that the election must be set aside and a new election held.

The issue raised by the Petitioner's objection is whether the Employer substantially complied with the Acting Regional Director's preelection letter requiring the Employer to provide a list of eligible voting employees, consistent with *Excelsior Underwear*, 156 NLRB 1236 (1966), and *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Acting Regional Director's letter, dated November 30, 1995, directed the Employer to file with the Regional Office a list "containing the *full* names and addresses of all eligible voters" (emphasis in original) and cited to, *inter alia*, *North Macon*, *supra*. The letter also warned that the Employer's failure to comply "shall be grounds for setting aside the election whenever proper objections are filed." It is undisputed that the list provided by the Employer set forth the employees' last names and first initials, but not their full first names.

In *North Macon*, the Board held that an employer must provide the full first and last names of employees on a voter eligibility list in order to comply substantially with the *Excelsior* list requirement. Further, the Board made clear that because the *Excelsior* rule is prophylactic, evidence of actual prejudice resulting from an employer's failure to substantially comply is not required: "the potential harm from list omissions is deemed sufficiently great to warrant a strict rule that encourages conscientious efforts to comply." 315 NLRB at 361, quoting *Thrifty Auto Parts*, 295 NLRB 1118 (1989). The Board also stated that it would regard the submission of an *Excelsior* list containing

only last names and first initials as evidence of an employer's bad-faith effort to avoid the *Excelsior* rule's requirements. 315 NLRB at 361.

In the instant case, the Employer did not substantially comply with the Acting Regional Director's *Excelsior* letter because it did not provide the full names of the employees. This conduct, in and of itself, fully supports the Petitioner's claim of objectionable conduct. Accordingly, we will set aside the election results and direct a second election. *Weyerhaeuser Co.*, 315 NLRB 963 (1994); *North Macon*, *supra*.

The Employer's exceptions to the hearing officer's report address several matters that were part of the litigation below. Its exceptions to certain of the hearing officer's evidentiary and procedural rulings relate to the question of actual prejudice resulting from the Employer's lack of compliance. As explained above, no showing of actual prejudice is required, and therefore, these exceptions are without merit. To the extent that the Employer's contention that the Petitioner is "estopped" from filing its objection relies on the question of actual prejudice, it is similarly without merit. To the extent that the "estoppel" argument relies on the Petitioner's asserted failure to file similar objections in previous elections, the Employer misses the relevant issue: its failure to respond adequately to the Acting Regional Director's letter. The Petitioner engaged in no conduct which reasonably would have caused the Employer to conclude that the Acting Regional Director's order could be ignored.¹ In addition, there is no evidentiary support for the Employer's exception that the parties' stipulated election agreement embodies an implicit waiver of the Petitioner's right to receive a voter eligibility list consistent with the *North Macon* standard. In any event, the Employer's failure to comply with the Acting Regional Director's letter is at issue here, not the parties' obligations under the agreement.

Finally, there is no merit in the Employer's contention that the legal standard established in *North Macon* is invalid and could not be invoked here because it was not formulated in a rulemaking proceeding. In support of this contention, the Employer cites *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 (1969). But in *Wyman-Gordon*, a majority of the Court agreed that the employer in that case was properly bound by the requirement that it submit a list of unit employee names to the union, because that requirement was stated in the Regional Office's specific directions to the employer for the election in question. In the present

¹ *Red Carpet Building Maintenance Corp.*, 263 NLRB 1285 (1982); *Sprayking, Inc.*, 226 NLRB 1044 (1976), and *Hamlin-Overton Frame Co.*, 219 NLRB 696 (1975)—all cited by the Employer in its "equitable estoppel" argument—are distinguishable on several grounds. Most significantly, in none of these cases did the employer fail to comply substantially with the *Excelsior* list requirement.

case, requiring the Employer to comply with the direction in the Acting Regional Director's letter that it produce a list of full names of employees is fully consistent with the Supreme Court's holding. Furthermore, as to the propriety of the Board's announcement of the full name requirement in *North Macon* rather than in a rulemaking proceeding, the Court's later explication of *Wyman-Gordon* in *NLRB v. Bell Aerospace Co.*,

416 U.S. 267, 294 (1974), makes it clear that "the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion."

[Direction Of Second Election omitted from publication.]